

The Rule of Law as a Culture of Legality: Legal and Extra-legal Elements for the Realisation of the Rule of Law in Society

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1.1. Introduction

Many legal scholars appear reluctant to acknowledge or to address extra-legal aspects that, in a particular social context, determine the success or failure of the implementation of the rule of law. The reason for this may be that these scholars would be compelled to adopt a less juridical, more sociological approach in their investigation of the rule of law. This article, however, provides a broad, interdisciplinary account of legal and extra-legal circumstances that lead to the successful (or unsuccessful) realization of the rule of law.

Although the meaning of the rule of law is always open to debate, there is general agreement that it is essentially concerned with protecting individuals from unpredictable and arbitrary interference with their vital interests. Such interference may come from two basic sources: other individuals, or government. Thus, a community is 'ruled by law' if people are protected from all forms of arbitrary violence and if laws exist that are clearly established to maintain peace and avoid a Hobbesian state of 'warre of every man against every man'.¹

But once positive laws are created in order to regulate private coercion and violence, the government itself can become arbitrary and violent. This leads to basic laws being extended to the regulation of government action, so that the rule of law ceases to be just 'a rule among citizens' and becomes, instead, 'a rule among rulers'.² Indeed, there is a broad understanding that the rule of law means something more than the legal sanction of every government action. In contrast to the 'rule of men', this ideal of legality is designed to minimise public and private arbitrariness so that personal freedom can be preserved.

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¹ Thomas Hobbes, *Leviathan* (1651). Chapter XIII, parag.62.

² Sir Ivor Jennings, *The Law and the Constitution*. London: University of London Press, 1959, p.47.

In this sense, the noble objective of the rule of law involves a formal delimitation of government functions, so that the power of every authority is exercised in accordance with clear, stable, and general rules of law. Such rules need to be promulgated in advance and properly enforced by independent and impartial courts. By forcing public authorities to follow legal forms and procedures, law operates, then, to reduce the possibility of the government being able to excessively coerce, obstruct, or otherwise unreasonably interfere with the life, liberty, and property of the citizen.³

But even if the rule of law is often observed in this sense, as one in which the state is regulated by basic rules of law, one should never lose sight of the underlying objective, which is to protect everyone from arbitrariness of all sorts. Of course, one danger if general compliance with law becomes too weak is that laws against private coercion will not be enforced, and the rule of law, even in the broader sense, is damaged. In the long run, however, the rule of law cannot be attained only by means of constitutional design or elite-level manoeuvres, rather, the survival of the rule of law depends on a proper culture of legality, that is, on society's broad recognition that respect for law must become a basic standard of human behaviour.⁴

1.2. Conceptions of the Rule of Law

An underlying theme in modern constitutional history is that the rule of law provides at least part of the solution to the problem of despotism, here understood as the existence of any abusive, external (governmental) control over the life, liberty, and property of the individual.⁵ In his classic text, *The Spirit of Laws*, Montesquieu crystallises the most important aspects of this type of government as follows: 'In despotic government, one alone, without law and without rule, draws everything along by his will and his caprices'.⁶ And later: 'the principle of despotic government [is]... fear'.⁷

Forestalling a situation in which directives issuing from government are absolute, and basic (constitutional) laws then are worthless, the rule of law denies state authorities any 'right to destroy, enslave, or designedly to impoverish the subjects'.⁸ Instead, the rule of law implies that 'government can act only through law and law checks the power of government'.⁹ As conceived in countries such as Britain and the United States, the rule of law is intrinsically related to 'an ideal undoubtedly connected with individual freedom understood as freedom from [unduly arbitrary] interference on the part of everybody, including the authorities'.¹⁰

³ Ibid, pp.45-66.

⁴ Herbert L.A. Hart, *The Concept of Law*. Oxford: Oxford University Press, 1961, p.116

⁵ Suri Ratnapala, *Welfare State or Constitutional State?* Sydney: The Centre for Independent Studies, 1990, p.19.

⁶ Baron de Montesquieu, *The Spirit of Laws* (1748). Bk.2, chap.1.

⁷ Ibid, Bk.3, chap.9.

⁸ John Locke, *Second Treatise on Civil Government* (1689). Sec.135.

⁹ Miguel Schor, *The Rule of Law*. From: D. Clark (ed.), 'Encyclopedia of Law and Society: American and Global Perspectives', London: Sage, 2005.

¹⁰ Bruno Leoni, *Freedom and the Law*. Los Angeles: Nash, 1972, p.76

In the English-speaking world, the contemporary debate over the meaning of the rule of law is carried out between advocates of its formal conception and those of its substantive conception. Those holding to a formal conception believe the rule of law encompasses only attributes concerning the form of laws, such as that they must as a rule be stable, publicised, clear, and general, whereas proponents of a substantive conception go beyond such formal description so as to include in their analysis a broader discussion of the legal protection of moral rights.¹¹ Both conceptions, however, are in common agreement that the rule of law acts as an important mechanism to minimise arbitrariness and so promote justice and personal freedom.

Amongst democracies of Continental Europe, the ideal of the rule of law has traditionally been interpreted as being endowed with a substantive meaning, and thereby associated with a certain understanding of the state that 'is bound by the law in its dealings with citizens: its power is in other words limited by the individual rights of the people'.¹² In Germany, the traditional notion of *Rechtsstaat* (here understood as 'the state where the rule of law prevails') 'means primarily recognition of the fundamental civil rights... such as civil liberty (protection of personal freedom, freedom of belief and conscience, freedom of the press, freedom of movement, freedom of contract, and freedom of occupation), [formal] equality before the law, and the guarantee of (acquired) property'.¹³ As with Germany, jurists in neighbouring France consider the rule of law 'a matter of personal liberty', subsequently maintaining that freedom 'cannot be secured absent of a certain type of state, namely... the state under the rule of law'.¹⁴

1.2.1. Formal Conceptions

Those in the English-speaking world who normally subscribe to a formal conception of the rule of law associate it with certain procedural and institutional requirements which are analysed as being necessary for the implementation of 'government under law'. They postulate a more literal interpretation of the phrase, focusing on addressing the manner in which

¹¹ For a more detailed analysis of formal and substantive conceptions of the rule of law, see: Jeffrey Goldsworthy, *Legislative Sovereignty and the Rule of Law*. From: T. Campbell, K.D. Ewing, and A. Tomkins (eds.), 'Sceptical Essays on Human Rights'. Oxford: Oxford University Press, 2001, p.64. See also: Paul Craig, *Formal and Substantive Conceptions of the Rule of Law*, Public Law, Autumn 1997, pp.467-487. See also: Paul Craig, *Constitutional Foundations, the Rule of Law and Supremacy*. Public Law, Spring 2003, pp. 92-111. See also: Richard H. Fallon, *The Rule of Law as a Concept in Constitutional Discourse*. 97 Columbia Law Review 1, January 1997.

¹² R.C. van Caenegem, *An Historical Introduction to Western Constitutional Law*. Cambridge: Cambridge University Press, 1995, p.15.

¹³ Ernst-Wolfgang Böckenförde, *State, Society and Liberty: Studies in Political Theory and Constitutional Law*. New York: Berg, 1991, p.50.

¹⁴ Blandine Kriegel, *The State and the Rule of Law*. Princeton: Princeton University Press, 1995, p.41. See also: Cohen-Tanugi, *La Métamorphose de la Démocratie Française: De l'État Jacobin à l'État de Droit*. Paris: Gallimard, 1993.

positive laws in a rule-of-law system are promulgated, as well as other formal aspects such as their clarity and temporal dimension.¹⁵ Paul Craig explains:

Formal conceptions of the rule of law do not... seek to pass judgement upon the actual content of the law itself. They are not concerned with whether the law is in that sense good law or a bad law, provided that formal precepts of the rule of law are themselves met.¹⁶

According to Joseph Raz, a well-known legal philosopher and proponent of a formal conception of the rule of law, the phrase entails an understanding of legality which demands that public authorities conduct their affairs in accordance with certain procedural requirements. This requires legislation to be mostly general, prospective, open, clear, and relatively stable. Raz also argues that in every rule-of-law regime, independent courts shall uphold certain principles of natural justice, such as fair hearings and the absence of bias. Finally, he argues that, in every regime such as this, the courts are without long delays and excessive costs, and are accessible to every citizen.¹⁷

But, as mentioned earlier, a formal conception of the rule of law does not correlate with substantive outcomes. On the contrary, Raz and other formal-conception advocates do not see any promise of substantive justice in the rule of law. While a formal conception maintains that some principles of procedural fairness may increase prospects for individual autonomy, no promise of substantive justice is made. This is the case because 'formalists' interpret the rule of law as necessary to restrain private violence and undue government coercion to ensure that citizens can be protected against lawlessness and anarchy.¹⁸ Even so, the rule of law is still seen by formalists as encompassing nothing more than a negative value that is 'merely designed to minimize the harm to freedom and dignity which the law may cause in its pursuit of its goals however laudable these may be'.¹⁹

1.2.2. Substantive Conceptions

In contrast to the jurists holding to formal conceptions, proponents of substantive conceptions argue that, under a rule-of-law system, laws must be structured around moral rights and duties that individuals ought to possess towards one another and the society as a whole, including state authorities. In other words, upholders of substantive conceptions make a clear distinction between 'good' laws, which comply with protection of such rights, and 'bad' laws, which do not.²⁰

¹⁵ Joseph Raz, *The Authority of Law: Essays on Law and Morality*, Oxford: Clarendon Press, 1979, p.218.

¹⁶ Craig, *Formal and Substantive Conceptions of the Rule of Law*, op. cit., p.467.

¹⁷ Raz, op. cit., p.228.

¹⁸ Geoffrey de Q. Walker, *The Rule of Law: Foundations of Constitutional Democracy*. Melbourne: Melbourne University Press, 1988, p.24.

¹⁹ Raz, op. cit., p.228.

²⁰ Paul Craig, *Formal and Substantive Conceptions of the Rule of Law*, op. cit., p.467.

One of the most famous advocates of the substantive concept, the Austrian philosopher Friederich A. Hayek, considered the rule of law 'a meta-legal doctrine or a political ideal concerning what the law ought to be'.²¹ Thus he maintained that the rule of law was basically about 'essential conditions of liberty under the law'.²² In a rule-of-law system, Hayek argued, legal discrimination can only be accepted if the majority, both inside and outside the discriminated group, supports it.²³ Although laws in a rule-of-law regime would not need to be the same for everybody, 'positive discrimination' should be accepted only on the grounds of advancing the common good. As a rule, and for the sake of preserving (formal) equality before the law, he considered that legal norms should preferably treat everybody the same, regardless of class, race, gender, and so on.

The work of another philosopher, the American law professor Ronald Dworkin, is also very popular in discussions about the nature of the rule of law. Dworkin describes the rule of law as an ideal of the 'good law' that is related to 'moral rights and duties' of the individual citizen, as well as the substantive protection of 'political rights against the state as a whole'.²⁴ These moral rights, he maintains, 'should be recognized in positive law', so as to be enforced through the courts upon the invocation of individual citizens. But even if not explicitly mentioned by positive law, he also thinks these rights would still be part of every constitutional order that is based on the ideal of the rule of law. In this sense the rule of law constitutes the community's effort to capture rights and duties which are deemed by the citizens as desirable for them on the various grounds connected with matters of individual autonomy and justice.²⁵ In describing his understanding of the rule of law as 'the ideal of rule by an accurate public conception of individual rights',²⁶ he contends that, in controversial cases, judges' decisions should be based on arguments of political principle which confirm 'that justice is in the end a matter of individual right, and not independently a matter of the public good'.²⁷

Also deserving of our consideration is T.R.S. Allan, an English constitutional lawyer. According to Allan, the rule of law is endowed with a substantive value which involves certain standards, expectations and aspirations that, in his opinion, 'encompass traditional ideas about individual liberty and natural justice and, more generally, ideas about the requirements of justice and fairness in the relations between governors and governed'.²⁸ Compliance with certain procedural legal principles, such as generality, clarity, non-retroactivity of law, as well as (formal) equality before the law, would, in his view, comprise an inherent moral value. This value enhances autonomy by allowing

²¹ Friederich A. von Hayek, *The Constitution of Liberty*. Chicago: University of Chicago Press, 1960, p.206.

²² *Ibid.*, p.205.

²³ *Ibid.*, p.154.

²⁴ Ronald Dworkin, *Political Judges and the Rule of Law*. 64 *Proceedings of the British Academy* 259, 1978, p.262.

²⁵ *Ibid.*, p.269.

²⁶ *Ibid.*, p.262.

²⁷ *Ibid.*, p.269.

²⁸ T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*. Oxford: Clarendon Press, 1993, p.21.

the individual citizen to organize his or her own affairs as well as to evaluate (and criticise) government actions according to those principles. On the other hand, Allan also thinks that equal dignity between citizens is what effectively constitutes 'the ultimate meaning of the rule of law'.²⁹ He asserts that in every rule-of-law system, our most basic (individual) rights are protected by 'an independent judiciary with authority to invalidate legislation if necessary'.³⁰ As a result, the rule of law might, in his opinion, promote a robust order of 'constitutional justice' in which 'the law is to constitute a bulwark between governors and governed, shielding the individual from hostile discrimination on the part of those with political power. The idea is that when we obey laws... we are not subject to another man's will and are therefore free'.³¹

As can be seen, advocates of substantive conceptions associate the rule of law with the liberal tradition of constitutionalism which declares the priority of the individual over the state.³² After all, as political-science professor Samuel Huntington explains: it was this liberal tradition that 'laid the basis for constitutionalism and the protection of human rights against the exercise of arbitrary power'.³³ Accordingly, the rule of law was hailed by liberal constitutionalists as the bedrock of every truly constitutional government, and hence of personal freedom.³⁴ Because such upholders of the substantive conception interpret the rule of law in the light of 'a liberal scheme of constitutional governance', the power of the state is thereby subordinated to enduring (constitutional) rules and principles that no public authority is authorised to abrogate.³⁵

For this reason, proponents of a substantive conception often argue that a judicially enforceable bill of rights is essential for the rule of law. But this is debatable on the grounds that one might argue that this could undermine the realization of the rule of law, in the sense that 'interpretation' of such abstract provisions can become indistinguishable from the moral and ideological tendencies of judges. According to Professor Gabriël Moens, the experience with bills of rights in numerous countries has revealed that the premise of judicial 'neutrality' and 'moderation' is rather illusory. Instead, as Moens points out:

²⁹ T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law*. Oxford: Oxford University Press, 2001, p.2.

³⁰ Jeffrey Goldsworthy, *Homogenizing Constitutions*. 23 *Oxford Journal of Legal Studies* 483, Autumn 2003, p.505.

³¹ Allan, *Law, Liberty, and Justice*, op. cit., p.44.

³² Allan C. Hutchinson and Patrick Monahan, *Democracy and the Rule of Law*. From: Allan C. Hutchinson and P. Monahan (eds.), 'The Rule of Law: Ideal or Ideology?' Toronto: Carswell, 1987, p.99.

³³ Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order*. New York: Simon & Schuster, 1996, p.70.

³⁴ Suri Ratnapala, *Securing Constitutional Government: The Perpetual Challenge*. The *Independent Review*, Vol.VIII, No.1, Summer 2003, p.9.

³⁵ Hutchinson, op. cit., p.100. See also: Suri Ratnapala, *The Other Road to the Republic*. Australia: Republic or Monarchy?' From: M.A. Stephenson and C. Turner (eds.), 'Republic or Monarchy? Legal and Constitutional Issues'. St Lucia: University of Queensland Press, 1994, p.215.

The possibility of attributing different meanings to the provisions of bill of rights creates the potential for judges to read their own biases and philosophies into such a document, especially if the relevant precedents are themselves mutually inconsistent. Indeed, in most rights issues, the relevant decisions overseas are contradictory. For example, rulings on affirmative action, pornography, hate speech, homosexual sodomy, abortion, and withdrawal of life support treatment vary remarkably. These rulings indicate that judges, when interpreting a paramount bill of rights, are able to select quite arbitrarily their preferred authorities...³⁶

Judicially enforced bills of rights confer on each judge the authority to determine the whole hierarchy of rights and interests in society. This may result in considerable usurpation of legislative functions by an unelected judiciary as every decision of enacting such a rights-document is also 'a decision to remove such issues from the agenda of the elected branches'.³⁷ However, when the courts pass controversial (politicised) decisions, it is extremely difficult to reverse such decisions due to the entrenchment of judicial precedents.³⁸ The final result can be 'an interpretative regime that places few, if any, constraints on the judiciary'.³⁹ Therefore, as Professor Jeffrey Goldsworthy points out:

The traditional conception of the judicial function... does not sit altogether comfortably with the enforcement of a bill of rights. In effect, they confer on judges a power to veto legislation retrospectively, on the basis of judgments of political morality... This involves adding to the judicial function a kind of power traditionally associated with the legislative function, except that the unpredictability inherent in its exercise is exacerbated by its retrospective nature. That is why, on balance, it may diminish rather than enhance the rule of law.⁴⁰

Whereas judicial independence and review are relevant mechanisms for curbing governmental arbitrariness, the rule of law is contrary to judges promoting policies that oblige the elected legislature to introduce new statutory laws according to the judges' 'creative interpretation'. In reality, advocates of both formal and substantive conceptions would agree that formal checks upon the judiciary are important to prevent judges from issuing commands that do not ensure satisfactory levels of conformity with the rule of law.

³⁶ Gabriël A. Moens; *The Wrongs of a Constitutionally Entrenched Bill of Rights*. From: Stephenson and Turner (eds.), op. cit., p.236.

³⁷ Stephen M. Griffin; *American Constitutionalism*. Princeton: Princeton University Press, 1996, p.123.

³⁸ Moens, op. cit., p.240.

³⁹ James Allan, *Oh That I Were Made Judge in the Land*. 30 Federal Law Review 561, 2000, pp.574-575.

⁴⁰ James Goldsworthy, *Legislative Sovereignty and The Rule of Law*, op. cit., p.75. As Goldsworthy also notes: 'It is not obvious that a judiciary, charged with weighing up and applying abstract moral principles in concrete cases is any more bound by the rule of law than is a sovereign legislature, responsible for translating the same moral principles into legislation'. – *The Sovereignty of Parliament: History and Philosophy*. Oxford: Oxford University Press, 1999, p.279. See also: Jeffrey Goldsworthy, *The Philosophical Foundations of Parliamentary Sovereignty*. From: T. Campbell and J. Goldsworthy (eds.); 'Judicial Power, Democracy and Legal Positivism'. Ashgate: Aldershot, 2000, p.248.

Of course, one needs to understand that a bill of rights is not necessarily inconsistent with the rule of law; bills of rights can be useful in situations where legislation is already violating basic rights of the individual. It can be equally important if one can find an imminent risk of human-rights violations in the near future.⁴¹ Depending on the social context, the enactment of a bill of rights may offer the educational advantage of ‘impress[ing] upon the public mind the value of individual rights and make them part of a political creed which the people will defend even when they do not fully understand its significance’.⁴²

In any other situation, and for the reasons explained above, one could argue that a bill of rights might be prejudicial not just to the rule of law but also to democracy. Indeed, as legal philosopher Jeremy Waldron comments, judicial enforcement of a bill of rights might become inconsistent with the right of citizens to participate in the decision-making process. Waldron summarises this critique in these terms:

If we are going to defend the idea of an entrenched Bill of Rights put effectively beyond revision by anyone other than the judges, we should... think [that]... even if you... orchestrate the support of a large number of like-minded men and women and manage to prevail in the legislative, your measure may be challenged and struck down because your view of what rights we have does not accord with the judges’ views.⁴³

In reality, it matters ‘comparatively little’ to the rule of law whether a bill of rights has been enacted, insofar as the government is able to recognise ‘the inalienable rights of the individual, inviolable rights of man’.⁴⁴ What is more, when a country enacts a constitutional bill of rights, the distinction between the formal and substantive conceptions of the rule of law loses much of its practical relevance. The reason for this is that, when the law formally recognises and protect basic rights, their violation is also a violation of the positive law, and thereby an infringement of the rule of law even in the formal sense. In the context of a country endowed with a rights-based constitution, the relevance of making a distinction between the formal and substantive conceptions becomes less important.

1.3. Elements of the Rule of Law

The experience garnered from many countries across the world might point to the relevance of certain standards of legality to the achievement of the rule of law. Such standards would define the basic characteristics of every legal system that is based on the rule of law.⁴⁵ What follows is a personal

⁴¹ Moens, *op. cit.*, p.247.

⁴² Hayek, *op. cit.*, p.217.

⁴³ Jeremy Waldron, *A Rights-Based Critique of Constitutional Rights*. 13 *Oxford Journal of Legal Studies* 18, 1993, pp.50-51.

⁴⁴ F.A. Hayek, *The Road to Serfdom*. London: Routledge, 1951, p.63.

⁴⁵ C.L. Ten, *Constitutionalism and the Rule of Law*. From: R.E. Goodwin and P. Pettit (eds.), ‘A Companion to Contemporary Political Philosophy’. Cambridge/MA: Blackwell, 1993, p.394.

compilation of certain principles and institutions which are broadly recognised as being requisite conditions for the realization of the rule of law.

1) *Laws against private coercion.* One of the most recognised purposes of the rule of law is that substantive laws must prohibit any form of coercion and violence so that citizens are protected against lawlessness and anarchy.⁴⁶ As such, the check on arbitrariness which the rule of law promises might be deployed not only against the government but also 'in the private domain where arbitrary social power... needs to be checked and regulated'.⁴⁷ Moreover, as Goldsworthy points out, 'chronic lawless violence inflicted by some citizens on others would surely be as antithetical to the rule of law as the lawless tyranny of a king or emperors'.⁴⁸

Although people who are inclined to break the law can be deterred by a real possibility of punishment, this control is more effective in societies which normally respect legality by approving of those who abide by legal rules and disapproving of those who violate legal rules. As Ralf Dahrendorf points out, 'if breaches of norms become sufficiently massive the application of sanctions becomes by the same token extremely difficult and sometimes impossible'.⁴⁹ Therefore, the society needs, in Hart's words, to 'accept these rules as common standards of behaviour and acknowledge an obligation to obey them, or even trace this obligation to a more general obligation to respect the constitution'.⁵⁰ When this happens, citizens comply with law, voluntarily, and the rule of law plays a fundamental role in society. It becomes the main mechanism for the regulation of human behaviour.⁵¹

2) *Laws should be clear, certain, adequately publicised and normally prospective.* If laws are unclear, uncertain, or not adequately publicised, people are unable to obey them; they would not know what the law really requires. They would then be left unable to conduct their private affairs with satisfactory levels of security, owing to a lack of knowledge concerning the content of the laws affecting themselves. From a moral point-of-view, legal certainty and clarity can provide a better quality of life to citizens, because, as Professor Neil MacCormick asserts, 'they can then have reasonable security in their expectations of the conduct of others, and in particular of those holding official positions under law'.⁵²

However, the rule of law does not endorse excessively vague laws which might delegate the power to deal arbitrarily with the citizen to public

⁴⁶ Walker, *op. cit.*, p.24.

⁴⁷ Christine Sypnowich, *Utopia and the Rule of Law*. From: D. Dyzenhaus (ed.); 'Recrafting the Rule of Law: The Limits of Legal Order'. Oxford: Hart Publishing, 1999, p184.

⁴⁸ Goldsworthy, *Legislative Sovereignty and The Rule of Law*, *op. cit.*, p.65.

⁴⁹ Ralf Dahrendorf, *Law and Order*. London: Stevens & Sons, 1985, p.33.

⁵⁰ Hart, *op. cit.*, pp.116-117.

⁵¹ James S. Campbell, *The Rule of Law: The Evolution of Social Order*. From: M. S. Eisenhower (ed.), 'The Rule of Law: An Alternative to Violence – A Report to the National Commission on the Causes and Prevention of Violence'. Nashville: Aurora Publishers, 1970, p.8.

⁵² Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning*. Oxford: Oxford University Press, 2005, p.16.

agencies.⁵³ A regime holding to the rule of law forbids *ex post facto* legislation, unless such retroactivity can be applied for the benefit of legality itself by curing irregularities of the legal form. As Lon Fuller explained, 'it is when things go wrong that the retroactive statute often becomes indispensable as a curative measure; though the proper movement of law is forward in time, we sometimes have to stop and turn about to pick up the pieces'.⁵⁴

3) *The rule of law implies a certain generality of law.* The idea of generality claims that positive laws must not contain proper names but rather apply to general classes of individuals.⁵⁵ This particular understanding of generality holds that laws should act impersonally so as to reduce the scope for legal discrimination.⁵⁶ The objective is, therefore, not to impose a condition of substantive equality amongst the citizens, but rather to effectively prevent laws from unnecessarily harming individuals and/or social groups.

Whereas generality in this sense does not require that laws possess universal application, it nonetheless implies, in the words of Professor Suri Ratnapala, 'a rational and non-arbitrary basis for differential treatment of individuals and groups'.⁵⁷ As Waldron explains: 'the rule of law does not prohibit the making of particular legal orders..., but it insists that the making of such orders should be guided by the application of universal rules... or at least justified in terms of universal principles'.⁵⁸ Thus, generality in this sense constitutes a basic means by which laws reflect the community's best interests and rejects the mere will or caprices of the state authorities. This does not mean, however, that laws cannot draw distinctions based on age, sex, etc., if there are good reasons for doing so (for example, to protect pregnant women or children from harm).

4) *Laws should be as stable as possible.* The rule of law does not prosper if legislation is constantly changed or substantially modified. Legal stability is an important condition for the citizen to effectively know with which laws he or she has to comply. Hence, constant changes to the positive law make it very hard, if not impossible, for citizens to plan their lives according to law. The aim of stability is, therefore, to facilitate individual planning and enable a 'fruitful interaction' among the individual citizens.⁵⁹

On the other hand, judges may also undermine the rule of law by bringing about uncertainty and unpredictability in the formal legal system. If trials are normally seen as unavoidably uncertain and not objectively just, then, argues

⁵³ Walker, *op. cit.*, p.25.

⁵⁴ Lon Fuller, *The Morality of Law*. New Haven: Yale University Press, 1964, p.53.

⁵⁵ T.R.S. Allan, *Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism*. 44 Cambridge Law Journal 111, March 1985, p.114.

⁵⁶ See: Fuller, *op. cit.*, p.47.

⁵⁷ Ratnapala, *op. cit.*, p.9.

⁵⁸ Jeremy Waldron, *The Rule of Law in Contemporary Liberal Theory*. 2 Ratio Juris 79, 1989, p.81.

⁵⁹ Martin Krygier, *The Grammar of Colonial Legality: Subjects, Objects, and the Australian Rule of Law*. From: G. Brennan and F.G. Castles (eds.); 'Australia Reshaped: 200 Years of Institutional Transformation'. Cambridge: Cambridge University Press, 2002, p.234.

High Court of Australia judge Dyson Heydon, 'the chances of peaceful settlement of disputes are reduced and the temptation to violent self-help increases'.⁶⁰

5) *Laws limiting, controlling and guiding the exercise of official discretion.* The rule of law regulates the sphere of action of public officials. These officials must consider laws as 'common standards of official behaviour and appraise critically their own and each other's deviations as lapses'.⁶¹ A government under the rule of law is a government whose legitimacy resides exclusively in the exercise of power in accordance with legal norms. In such a situation, citizens do not owe obedience to the person who holds power, but rather to the impersonal order which confers such power unto him.⁶² The idea of an impersonal order as a legally circumscribed structure of power is a main element of Weberian interpretation of the rule of law. According to Max Weber, the 'rational-legal' order of a government under law implies 'that the person who obeys authority does so, as it is usually stated, only in his capacity as a member of the corporate group and what he obeys is only the law'.⁶³

The fact that public officials are obliged to respect legal rules imposes a considerable restriction on arbitrary power.⁶⁴ However, it is not the mere exercise of public coerciveness that distinguishes arbitrary government from a government under the rule of law, but rather the degree to which the state's control of the means of violence is subject to laws which are general, clear, stable, non-retrospective, etc. Thus citizens must know to what degree and in what circumstances they are bound to obey, although they cannot know this unless there are laws to regulate how much power the government has over them.

In order to protect people from undue arbitrariness, there shall exist no detention without charge, nor convictions without sufficient evidence.⁶⁵ All such situations are related to the fact that citizens must be protected by due process of law. The phrase 'due process' involves the existence of legal proceedings designed to allow any person accused of criminal offence or civil wrong to be heard in a regular court and be informed of the nature of the accusation.⁶⁶ There is, moreover, a general agreement that 'due process' encompasses the presumption of innocence in criminal cases, and the right to be judged impartially.⁶⁷

⁶⁰ Dyson Heydon, *Judicial Activism and the Death of the Rule of Law*. Quadrant, January-February 2003, p.10.

⁶¹ Hart, *op. cit.*, p.117.

⁶² Max Weber, *Theory of Social and Economic Organization*. New York, MacMillan, 1948, p.330.

⁶³ *Ibid.*

⁶⁴ Raz, *op. cit.*, p.219.

⁶⁵ Sypnowich, *op. cit.*, p.180.

⁶⁶ Some judges argue that due process protects only the guarantees of the U.S. 'Bill of Rights'. Others, however, contend that the courts can also protect 'fundamental rights' not included in that bill of rights.

⁶⁷ Rodney Mott, *Due Process of Law*. New York: Da Capo, 1973, p.592. The first mention of 'due process' in history appeared about seven centuries ago, in 1344, when the English Parliament successfully compelled King Edward III to consent to a statutory law curbing his

6) *The courts must be independent, impartial, and accessible to everyone.* In a system that truly adheres to the rule of law, citizens must be endowed with the basic right to submit their complaints before the impartial adjudication of an independent court system. In addition, access to the courts must be provided without long delays, corruption, or excessive legal costs in filing any lawsuit as such issues would turn even an 'enlightened' legislation into a dead letter.⁶⁸

Central to the rule-of-law tradition is the conviction that a division of governmental functions constitutes 'a critical aspect of every system of government which hopes to combine efficiency and the greatest possible exercise of personal freedom'.⁶⁹ The idea rests upon the reasonable understanding that whenever the power of the state becomes too highly concentrated in the hands of an individual or political agency, the risk of arbitrariness subsequently increases. A truly independent judiciary may, therefore, compel public authorities to respect the proper limits of legality. Brian Z. Tamanaha reveals the rationale for such a division of government powers as follows:

Freedom is enhanced when the powers of the government are divided into separate compartments – typically legislative, executive, and judicial (horizontal division), and sometimes municipal, state or regional, and national (vertical division)... This division of powers promotes liberty by preventing the accumulation of total power in any single institution, setting up a form of competitive interdependence within the government.⁷⁰

Consequently, some may consider that a full separation of powers, as is the case in the United States, is essential to the rule of law. However, it is important also to consider that the British system, for instance, does not separate the executive branch (Cabinet) from the legislative branch. Moreover, the British Parliament is historically considered the High Court of Parliament, the highest court in the land. The executive, however, does not interfere in the day-to-day workings of the courts, and the tenure of judges is also protected from undue political pressure.⁷¹

monarchical power. The section is worth reproducing: 'No man of what estate or condition that he be, shall be put out of law or tenement, nor taken nor imprisoned, nor disinherited nor put to death without being brought in answer by due process of law'. The same expression, 'due process', would be later on enshrined in the Fifth Amendment to the U.S. Constitution, an amendment which says that no-one 'shall be deprived of life, liberty, or property without a due process of law'. Finally, a similar provision is found in the famous 1868 Fourteenth Amendment to the U.S. Constitution, which declares that it is forbidden for any state of the U.S. Federation to 'deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws'.

⁶⁸ Raz, *op. cit.*, p.217.

⁶⁹ M.J.C. Vile, *Constitutionalism and the Separation of Powers*. 2nd Edition, Indianapolis: Liberty Fund, 1998, p.261

⁷⁰ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*. Cambridge: Cambridge University Press, 2004, p.35.

⁷¹ Samuel E. Finer, *Comparative Government*. London: Penguin Press, 1970, p.148.

Although the adjudicating function is a normal reality throughout history, having existed since the establishment of the first human societies, judges have historically been subject to direct political interference by governments. This direct subjection to the political ruler has the obvious potential to undermine all prospects of impartial administration of justice according to the law. Arguably, only the members of a truly independent judiciary could be enabled, in due conscience and freedom, to 'reprimand the government and even force it to obey the law and redress injustice'.⁷²

It was only in the beginning of the eighteenth century that judges in Britain finally began to acquire a few, albeit essential, guarantees of independence from the government. In 1701, the Act of Settlement conferred on judges the right to stay in office *quam diu se bene gesserint* (as long as acting with diligence). It also required that their salaries be determined only by means of statutory provision. Ever since, the law in Britain regulates both tenure and removal of magistrates, and requires the assent of both Houses of Parliament for their impeachment.

But even if an independent judiciary might serve as the ultimate guarantor of the rule of law, ensuring that no-one can violate laws with impunity, independence by itself does not guarantee impartiality.⁷³ Independence without strict impartiality can make judges a law unto themselves. The legal system needs, therefore, to insure that the arbitrators (i.e., judges) will not themselves become too arbitrary. Judges must be guided by legal norms and principles every time they pass their rulings.⁷⁴ Even if constitutionally secured, judicial independence 'does not necessarily deliver impartial law enforcement, which is one of the things we hope to gain from the rule of law'.⁷⁵

7) *The rule of law stands in opposition to extemporary decisions expressing the mere personal will of individual judges.* Indeed, it has already been suggested that the rule of law means the existence of clear, stable, general norms, which must apply equally to everyone regardless of a person's social status or position in the public administration. Characterised in this way, this legal ideal cannot be fully developed if judges pass rulings without being respectful of the existence and content of legal rules. Because of this, explains the Italian political philosopher Pasquale Pasquino:

[T]he person who judges exercises, in a sense, the most worrying power of all. In daily life it is not the legislator who renders judgement or passes sentence, but the judge... The judge protects the citizen from the caprices

⁷² Caenegem, op. cit., p.15.

⁷³ For examples of independent but partial judiciaries, see: José Maria Maravall; *Rule of Law as a Political Weapon*. From: J.M. Maravall and A. Przeworski (eds.), 'Democracy and the Rule of Law'. Cambridge: Cambridge University Press, 2003, pp.261-315.

⁷⁴ J.R. Lucas, *The Principle of Politics*. Oxford: Clarendon Press, 1966, p.24.

⁷⁵ Martin Krygier, *The Rule of Law: An Abuser's Guide*. Paper presented at the 13th Annual Conference on 'The Individual vs. the State', Central European University, Budapest, June 10-11, 2005, p.19.

and arbitrary will of the legislator, just as the existence of the law protects the accused from the caprices and arbitrary will of the judge.⁷⁶

‘Unless corruption or ineptitude pervades the judiciary’, argues Tamanaha, ‘the rogue judge will be checked... by... other judges, either sitting on the same panel or at high levels of appellate review’.⁷⁷ Thus judges need to properly understand that nobody, not even a judge from a high court, has the right to ignore basic legal norms. In fact, judges who abuse their position in order to satisfy personal interests cannot possibly be described as equitable upholders of the legal system. As Chief Justice Murray Gleeson from the High Court of Australia explains:

Judges are appointed to interpret and apply the values inherent in the law. Within the limits of the legal method, they may disagree about those values. But they have no right to throw off the constraints of legal methodology. In particular, they have no right to base their decisions about the validity of legislation upon their personal approval or disapproval of the policy of the legislation. When they do so, they forfeit their legitimacy.⁷⁸

In this sense, the power of judges to ‘create’ laws is not to be exercised in absolute dissonance with the existing legal norms and principles. ‘Since [every judge] is bound to administer justice *according to law*, including legislation of which he may disapprove’, explains T.R.S. Allan, ‘he must faithfully accord every Act of Parliament its full and proper application’.⁷⁹ This means that, to become an institutional support for the rule of law, courts must be non-partisan in the political process.

Naturally, one can reasonably accept that a judge may sometimes need, for reasons of ambiguity, vagueness, inconsistency, or ‘gap’, to complement the legal order with innovative judicial rulings. But it does not follow from this that he or she is authorised to blatantly ignore any law enacted by the elected parliament, just because he or she may not particularly appreciate its provisions. The case against this anti-legal judicial attitude has been placed in classical terms by the late U.S. constitutionalist Thomas M. Cooley:

The property or justice or policy of legislation, within the limits of the Constitution, is exclusively for the legislative department to determine; and the moment a court ventures to substitute its own judgement for that of the legislature, it passes beyond its legitimate authority, and enters a field where it would be impossible to set limits to its interference, except as should be prescribed in its own discretion.⁸⁰

⁷⁶ Pasquale Pasquino, *One and Three: Separation of Powers and the Independence of the Judiciary in the Italian Constitution*. From: J. Ferejohn, J.N. Rakove and J. Riley (eds.), ‘Constitutional Culture and Democratic Rule’, Cambridge: Cambridge University Press, 2001, p.211.

⁷⁷ Tamanaha, *op. cit.*, p.88.

⁷⁸ Murray Gleeson, *The Rule of Law and the Constitution*. 2000 Boyer Lectures, Sydney: ABC Books, 2000, p.134.

⁷⁹ Allan, *Legislative Supremacy and the Rule of Law*, *op. cit.*, p.130.

⁸⁰ Thomas Cooley, *Principles of Constitutional Law*. Boston: Little, Brown & Cia, 1898, p.158.

1.4. The Rule of Law and Culture of Legality

Regardless of which conception of the rule of law is embraced, its practical achievement may require a proper culture of legality.⁸¹ This culture incorporates a positive attitude toward legal norms as might be demonstrated by a socio-political context in which both ordinary citizens and public officials manifest a serious commitment to principles and institutions of the rule of law. They demonstrate commitment by generally complying with its basic principles and institutions, insisting on their compliance, criticizing those who fail to comply with them, and, finally, taking whatever action is necessary to correct any lack of compliance.

In his classic *Considerations on Representative Government* (1861), John Stuart Mill speculated that some peoples would be culturally unqualified to accept all moral implications of a representative government under the rule of law. He developed this argument according to the presupposition that the reality of 'government under law' is 'determined by social circumstances'.⁸² Because Mill considered that such circumstances nonetheless are malleable, and can therefore be changed for either better or worse, he believed that people can be taught to behave in a democratic manner and according to the rule of law. And yet, he kept insisting that some patterns of cultural behaviour are basic in determining the realization of the rule of law. As Mill explained:

The people for whom the form of government is intended must be willing to accept it; or at least not so unwilling as to oppose an insurmountable obstacle to its establishment... A rude people..., may be unable to practice the forbearance which... [government under law] demands: their passions may be too violent, or their personal pride too exacting, to forego private conflict, and leave to the laws the avenging of their real or supposed wrongs.⁸³

Many lawyers today, however, seem to have a certain tendency to make exaggerated claims for what laws can deliver in terms of achievement of the rule of law. For instance, those who believe that a judicially enforced bill of rights might be enough to protect the basic rights of citizens need to be more careful not to downplay the socio-political context in which abstract formal postulations are applied. After all, some of the worst human rights violators across the world have produced impressive documents with respect to the legal protection of such rights. For example, the governments of China, Cuba, Rwanda, Sudan – all of them notorious violators of human rights – have elaborated impressive bills of rights. Even the former Soviet Union under Joseph Stalin's tyrannical rule was in possession of an equally impressive bill of rights. Sir Harry Gibbs provides telling evidence of this fact:

⁸¹ Jason Mazzone, *The Creation of a Constitutional Culture*. 40 *Tulsa Law Review* 671, 2005, p.686.

⁸² J.S. Mill, *Considerations on Representative Government* (1861). Chicago: William Benton, 1952, p.31.

⁸³ *Ibid.*, p.29.

Anyone who has seen the film *The Killing Fields* will know that the fact that the Khmer Republic [in Cambodia] had adopted a bill of rights that did not assist the inhabitants of that unhappy country. We are all familiar with the abuses that have occurred in Uganda: that country had a bill of rights on the European model, and had judges who bravely tried to enforce it, but were unable to resist the forces of lawlessness.⁸⁴

In this sense, Professor Martin Krygier has already demonstrated in numerous of his works on the subject, the intrinsic correlation between the rule of law and its socio-politico-cultural milieu.⁸⁵ According to him, the realization of an ideal such as the rule of law 'depends as much on characteristics of society as of the law, and on their interactions'.⁸⁶ Therefore, he maintains:

Even if you conclude that legal institutions of certain kinds are necessary to achieve [the rule of law], they will never be sufficient. The institutions... have to *count* in social life, and what makes law count, still more what makes it count as a restraint on arbitrary power, is one of the deepest mysteries of the rule of law, and it does not just depend on the law. For what ultimately matters is how the law affects those to whom it is *directed*, not how, or the particular forms which, it is *sent*. We, lawyers especially, know a lot about the latter but much less than we imagine about the former... What we need, and what we don't have is a political sociology of the rule of law, but only with that will we be able to say with any confidence, though still not in one-size-fits-all terms, how to instantiate it.⁸⁷

Krygier then suggests that the rule of law is not just a matter of 'detailed institutional design' but also an 'interconnected cluster of values' that can be pursued in a variety of institutional ways.⁸⁸ As he also explains, the empirical fact that the rule of law has 'thrived best where it was least designed'⁸⁹ provides the best evidence that this legal ideal is actually more about a 'social outcome' (i.e. the restriction of government arbitrariness) than just a 'legal mechanism'.⁹⁰ In essence Krygier postulates that the achievement of the rule of law rests primarily with extra-legal circumstances of 'social predicability', not just formal-institutional mechanisms.⁹¹

⁸⁴ Sir Henry Gibbs, *A Constitutional Bill of Rights? From 'An Australian Bill of Rights: Pro and Contra*. K. Baker (ed.). Melbourne, Institute of Public Affairs, 1986, p.40.

⁸⁵ See: Martin Krygier, *Ethical Positivism and the Liberalism of Fear*. From: T. Campbell and J. Goldsworthy (eds.), 'Judicial Power, Democracy, and Legal Positivism'. Ashgate: Aldershot, 2000, p.64. See also: Krygier, *Compared to What? Thoughts on Law and Justice*. Quadrant Magazine, December 1993. See also: Krygier, *Transitional Questions about the Rule of Law: Why, What, and How?* Paper delivered at the conference 'East Central Europe: From Where to Where? Organized by East Central Institute for Advanced Study. Budapest, 15-17 February 2001. See also: Krygier, *Institutional Optimism, Cultural Pessimism and the Rule of Law*. From: M. Krygier and A. Czarnota (eds.), 'The Rule of Law After Communism: Problems and Prospects in East-Central Europe'. Aldershot: Ashgate, 1999. See also: Krygier, *Rule of Law*. From: N.J. Smelser and P.B. Baltes (eds.), 'International Encyclopedia of the Social & Behavioral Sciences', 2001, p.13404.

⁸⁶ Krygier, *False Dichotomies*, op. cit., p.11.

⁸⁷ Krygier, *The Rule of Law: An Abuser's Guide*, op. cit., p.7.

⁸⁸ Krygier, *Rule of Law*. op. cit., p.13404.

⁸⁹ Krygier, *Compared to What?* op. cit., p.52.

⁹⁰ Krygier, *The Rule of Law*, op. cit., p.23.

⁹¹ *Ibid*.

The constitutional history of Great Britain provides one of the best examples that the rule of law may indeed depend less on formal recipes for legal-institutional design than on the particular efforts of the community to produce socio-politico-cultural conditions of government under law. Although Britain still lacks a written (codified) constitution, it is still recognised as possessing a more orderly polity than the vast majority of its former colonies, some of which have clearly produced *de jure* democratic constitutions. However, these constitutions 'may be missing the tacit social approval that is needed to keep those documents alive'.⁹² Indeed, the rule of law was developed in Britain despite the absence of legal-institutional elements such as a clear division of governmental branches which have often been regarded as essential for its realization, particularly a separation of government functions between the legislative and the executive, as well as judicial review of legislation.⁹³ Rather, as Tamanaha explains:

The Rule of law existed [in Britain] owing to a widespread and unquestioned belief in the rule of law, in the inviolability of certain fundamental legal restraints on government, not to any specific legal mechanism. This answer to the ancient puzzle of how the law can limit itself is that it does not – attitudes about law provide the limits.⁹⁴

But when a government does not acknowledge any subjection to principles of the rule of law, power will rest not so much on basic (constitutional) provisions as on the 'concrete' supremacy of the political ruler.⁹⁵ Political rulers who are not willing to subject themselves to a system of checks and balances can easily place themselves above the rule of law. They may thus exercise their political power *per leges* (by legislation) but never *sub leges* (under the rule of law). Thus 'law' is transformed into an 'instrument for repression or at least top-down direction of subjects, and nothing more'.⁹⁶ And when this occurs, citizens are subject to a form of arbitrariness in which 'law' becomes a 'vehicle (and at times equally useful camouflage) for the exercise of unrestrained and uncivilized power'.⁹⁷ Thus, 'law' may under this socio-political context become a mere instrument of personal will, 'by which some men rule others, marshalling the resources, time and talents of the ruled in pursuit of the rulers' purposes'.⁹⁸

Governments that eschew the rule of law are always prepared to use naked power to achieve their political aims, although they will not allow themselves to be subject to a constitutional system of checks and balances. The rule of law can only subsist where there is a proper constitutional framework coupled with a culture of legality which places a high value on the ideal of 'government

⁹² Derick W. Brinkerhoff and Arthur A. Goldsmith, *Clientelism, Patrimonialism and Democratic Governance*. Paper prepared for U.S. Agency for International Development – Office of Democracy and Governance, December 2002, p.4.

⁹³ Tamanaha, *op. cit.*, p.56.

⁹⁴ *Ibid.*, p.58.

⁹⁵ Weber, *op. cit.*, p.215.

⁹⁶ Krygier, *The Grammar of Colonial Legality*, *op. cit.*, p.225.

⁹⁷ *Ibid.*

⁹⁸ Noel B. Reynolds, *Grounding the Rule of Law*. *Ratio Juris*, Vol.2, N.1, March 1989, p.7.

under law'. In the absence of this social perception of legality, a government can even draft a very sophisticated rights-based constitution; but this, in and of itself, will not ensure that constitutional rights will be seriously respected. They may in actual practice be worth no more than the paper on which they are written.

At this point, it is useful to consider that law is not always the primary source of political power.⁹⁹ Sociologists argue that there are other ways in which society can recognise this power other than through law. On the basis of charismatic leadership, for example, Weber explained that political power is socially endorsed by means of 'devotion to the exceptional sanctity, heroism, or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by him'.¹⁰⁰ This development results in a reality where 'charisma' is more important than law, and the rule of law is, therefore, not seen by society as the most acceptable element of power recognition. Sir Ivor Jennings noted:

If it is believed that the individual finds his greatest happiness, or best develops his soul, in a strong and powerful State, and that government implies... the unity of the nation behind a wise and beneficent leader, the rule of law is a pernicious doctrine.¹⁰¹

We may, therefore, conclude that a constitutional order that is inspired by principles and institutions of the rule of law may not operate properly unless the socio-political environment that surrounds the state legal system supports it. In certain countries of Latin America, for instance, political stability seems to rest less upon 'impersonal constitutions' and more upon certain 'personal pacts' that are established by political rulers at the head of an authoritarian power. In fact, political pacts in Latin American are often non-legal, although they may 'provide order by relying on personal loyalty, rather than law, to glue society together'.¹⁰² As Miguel Schor explains: 'constitutions are not entrenched in Latin America because political leaders do not fear citizen mobilization when fundamental rules of the game are violated'.¹⁰³

In this sense, what seems to give a 'real life' to the rule of law lies is the social environment, which, according to Lawrence M. Friedman, 'is constantly at work on the law – destroying here, renewing there; invigorating here, deadening there; choosing what parts of law will operate, which parts will not; what substitutes, detours, and bypasses will spring up; what changes will take place'.¹⁰⁴ Hence, even if a people can manage to draft a 'good' rights-based democratic constitution, another problem is for them to develop a certain culture of legality in which the value of 'government under law' is not trumped

⁹⁹ Brian Z. Tamanaha, *A General Jurisprudence of Law and Society*. Oxford: Oxford University Press, 2001, p.140.

¹⁰⁰ Weber, *op. cit.*, p.215.

¹⁰¹ Jennings, *op. cit.*, p.46.

¹⁰² Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*. 41 *Texas International Law Journal* 1, 2006, p.20.

¹⁰³ *Ibid.*, p.7.

¹⁰⁴ Lawrence M. Friedman, *The Legal System: A Social Science Perspective*. New York: Russell Sage, 1975, p.193-194.

by extra-legal (political) premises such as the one which informs that 'whoever wins election to the presidency is thereby entitled to govern as he or she sees fit'.¹⁰⁵ In the context of Latin America, for example, the political scientists Paola Cesarine and Katherine Hite note:

The persistence of authoritarian legacies in post-authoritarian democracies may be explained in terms of a combination of socially, culturally, and institutionally induced set of attitudes, perceptions, motivations, and constraints – that is, from traditions or institutions of the past as well as from present struggles within formally democratic arrangements... As a result, democracy in much of Latin America belongs to the realm of constitutions and code books rather than reality.¹⁰⁶

If compliance with laws does not rest on a firm element of public morality, then the rule of law becomes 'an impracticable and even undesirable ideal, and... society will quickly relapse into a state of arbitrary tyranny'.¹⁰⁷ Thus, the rule of law rests basically upon 'an attitude of restraint, an absence of arbitrary coercion by governments or by other individuals or groups'.¹⁰⁸ This can only be so if society embraces an ethic of legality that requires 'the virtue of a populace that will enjoy its benefits'.¹⁰⁹ In other words, the rule of law can only subsist in a social environment where the citizens will take their legal rights seriously, by considering the respect to principles and institutions of the rule of law as a matter of high moral obligation.¹¹⁰ In being so, the absence of social recognition to the supremacy of the rule of law over personal will may help to explain the constant failure of some peoples to properly resist arbitrary (non-legal) attempts by the state authorities over the life, liberty, and property of the individual citizen. As Noel B. Reynolds asserts:

The rule of law does poorly in cultures where it is not the fundamental expectation that a people has of its government... If people do not expect the rule of law and insist on it when officials move to compromise its effect, it is soon corrupted and replaced by rule of will. Rule of law seems to require this virtue of any populace that will enjoy its benefits.¹¹¹

1.5. Brazil: A Paradigmatic Example

A survey of the reality in a country like Brazil shakes one's faith in 'legal recipes' that may be proffered for the realization of the rule of law. Brazil is indeed a paradigmatic example of a nation suffering from a substantial lack of culture of legality. Although the law recognises that the Brazilian citizen

¹⁰⁵ Guillermo O'Donnell, *Delegative Democracy*. 5 Democracy 55, 1994, p.54.

¹⁰⁶ Paola Cesarine and Katherine Hite, *Introducing the Concept of Authoritarian Legacies*. From: K. Hite and P. Cesarini (eds.), 'Authoritarian Legacies and Democracy in Latin America and Southern Europe.. Notre Dame: University of Notre Dame Press, 2004, p.7.

¹⁰⁷ Hayek, *The Constitution of Liberty*, op. cit., p.206.

¹⁰⁸ Walker, op. cit., p.2.

¹⁰⁹ Reynolds, op. cit., p.7.

¹¹⁰ Philip Selzenick, *Legal Cultures and the Rule of Law*. From: Krygier and Czarnota (eds.), op. cit., p.37.

¹¹¹ Op. cit., p.7.

should have a vast number of 'fundamental' rights, such rights are often trumped by the more non-egalitarian, authoritarian structure of society. One of the reasons for the violation of these basic human rights is impunity, a critical factor contributing to the declining faith in the rule of law.¹¹² Indeed, Brazilians often say that there is only one 'law' which is always respected when you are rich or have 'powerful' friends: *a lei da impunidade* ('the law of impunity').

Due to the chasm that, in Brazil, separates law on paper and 'law' in practice, anyone wishing to understand how the country works in reality will need to consider the ways in which people are able to exempt themselves from the content of positive laws. Indeed, an observation of Brazil's reality reveals a society that is deeply regulated by *contra-legem* (anti-legal) rules. These are not the rules taught in the law schools but rather are socially defined rules that vary remarkably from the state codes and statutes, and the rulings of the courts.

Many laws have been introduced in Brazil with the almost certain knowledge that they will never be respected. Thus, as Professor Keith Rosenn explains: 'Brazilians refer to law much in the same manner as one refers to vaccinations. There are those who take, and those who do not'.¹¹³ He gives the insightful example of a Minister of Justice, Francisco Campos, who in the 1930s responded to criticisms about the enactment of a new law that was identical to another enacted by the same government only a year earlier by saying: 'There is no harm done, my son. We are going to publish this one because the other *não pegou* (did not take hold)'.¹¹⁴

For this reason, most of what really happens in a country like Brazil lies outside the statute books and law reports. There is a very sharp contrast between, on the one hand, statutes and the written texts of the constitution, and, on the other hand, the daily life as demonstrated in the dealings between individuals and public authorities.¹¹⁵ As such, Brazil is a typical example of a country where the 'laws' of the society can easily overrule the laws of the state.¹¹⁶ Socially speaking, the former can be far more institutionalised than the latter, which means that the state law can easily be undermined by the lack of connection between its formal precepts and observed behaviour.¹¹⁷

In Brazil, social status is far more important than legal protection, because law is generally perceived as not being necessarily applied to everyone.

¹¹² William C. Prillaman, *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*, London: Prager, 2000, p.76.

¹¹³ Keith S. Rosenn, *The Jeito: Brazil's Institutional Bypass of the Formal Legal System and its Developmental Implications*, 19 American Journal of Comparative Law, p.530.

¹¹⁴ *Correio da Manhã*. 11 December 1966, p.3. Quoted from: Rosenn, op. cit., p.531.

¹¹⁵ Phanor J. Eder, *Law and Justice in Latin America*. New York: New York University Press, 1937, p.57.

¹¹⁶ Roberto DaMatta, *Is Brazil Hopelessly Corrupt?* From: Levine and Crocitti (eds.), 'The Brazil Reader: History, Culture, Politics'. Duke University Press, 1999, p.296.

¹¹⁷ See: Guillermo O'Donnell, Guillermo, *Illusions about Consolidation*. From: L. Diamond, M.F. Plattner, Y. Chu, and H. Tien (eds.), 'Consolidating the Third Wave Democracies: Themes and Perspectives'. Baltimore/London: The Johns Hopkins University Press, 1997, p.46.

Unlike a typical North American citizen who would use the law to protect himself against any situation of social adversity, a citizen in Brazil would instead appeal to his social status; respecting the law in this country implies a condition of social inferiority and disadvantage that renders one subject to it.¹¹⁸ The fact that many people in Brazil often consider themselves above the law may be a legacy of the institution of slavery infecting contemporary Brazilian society. According to Joseph A. Page:

There are... societal ills that can be traced at least in part to slavery. For example, the slave owner could do as he pleased with his slaves without having to answer to anyone for the consequences of his actions. The master-slave relationship replicated the medieval relationship between Portuguese king and his subjects, and it came to define the link between the powerful and the powerless in Brazil... Indeed, a sense of being above the law became a prerogative of the nation's haves. The notion of impunity – the avoidance of personal responsibility – became deeply ingrained in Brazilianness and has proved a barrier to development.¹¹⁹

If the powerful uphold the law only when it suits them, other members of society will endeavour to do the same. People, thereby, feel themselves less morally compelled to obey laws and start resolving social conflicts by 'parallel' means, such as through social influence, corruption, and even violence (e.g. vigilante justice, lynchings, and land invasions). These alternative responses to the lack of legal protection end up undermining, even to a greater extent, prospects for a realisation of the rule of law.

In an important survey conducted by DaMatta in the mid 1980s, citizens in Brazil were asked how they would classify a person who obeys the law. The common answer was that such a person must be an individual of 'inferior' social status. But when asked about a wealthy person who wishes to obey the law, the common answer to this situation was that this person is a *babaca* (fool). DaMatta concluded from his empirical research that in Brazil, 'compliance with law conveys the impression of anonymity and great inferiority'.¹²⁰ Hence, the idea that laws should be applied indiscriminately clashes with deeply rooted values in Brazilian society.

To conclude, it is totally impossible to understand the obstacles facing the realization of the rule of law in Brazil if we confine ourselves to a purely legalistic and a less empirical analysis of the legal system. In order to comprehend the reasons for problems blocking the rule of law from taking hold in that society, we must necessarily turn our attention to the many patterns of social behaviour that inhibit normal respect for legal norms and principles.

¹¹⁸ See: José Murilo de Carvalho, *Pontos e Bordados: Escritos de Historia e Política*, Belo Horizonte: Universidade Federal de Minas Gerais, 1998, p.277-278.

¹¹⁹ Joseph A. Page, *The Brazilians*. Reading/MA: Addison-Wesley, 1995, p.235.

¹²⁰ *Op. cit.*, p.317.

1.6. Conclusion

The main objective of this article was to critically review the concept of the rule of law. The difference between formal and substantive conceptions has broadly been discussed, as well as how the ideal of the rule of law aims to reduce government arbitrariness. Under a rule-of-law regime, all public authorities, including judges and politicians, must be subject to certain rules and principles that are 'thought to be desirable on various grounds connected with liberty and justice'.¹²¹

While this article describes principles and institutions of the rule of law, it goes further than this so as to contend that the satisfactory realization of this legal ideal rests upon a 'culture of legality' that does not offer a comprehensive recipe for legal-institutional design. Instead, the rule of law depends upon a particular socio-politico-cultural milieu that simply cannot subsist without the proper assistance of a sociological context of due respect for legality. My intention was, therefore, to demonstrate that the realization of the rule of law is as much a cultural achievement as it is a legal-institutional one.

¹²¹ Waldron, *The Rule of Law in Contemporary Liberal Theory*, op. cit., p.81.